Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1274

DESERT CHRYSLER-PLYMOUTH, INC. and PETE KUBENA,

Petitioners,

vs.

CHRYSLER CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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In The

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No.

DESERT CHRYSLER-PLYMOUTH, INC. and PETE KUBENA,

Petitioners,

vs.

CHRYSLER CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Petitioners request that a writ of certiorari issue to review the decision/judgment of the Supreme Court of the State of Nevada, filed on October 10, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada, not yet reported, appears as Appendix B to this petition.

The opinion of the Clark County (Nevada) District Court, not reported, appears as Appendix C to this petition.

JURISDICTION

The decision/judgment of the Supreme Court of the State of Nevada was filed on October 10, 1979.

On October 24, 1979, pursuant to Rule 40(a) of the Nevada Rules of Appellate Procedure, petitioners duly moved for rehearing in the Supreme Court of the State of Nevada.

That court denied petitioners' motion in an order filed on December 14, 1979 (*see* Appendix A).

This petition for a writ of certiorari was served and filed within 90 days of December 14, 1979.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Does the decision below — that Nevada separation of powers is violated by provisions of a statute requiring a court to find "good cause" before a new automobile dealership can be established — rest on a state ground sufficiently "adequate" to preclude this Court's review of whether those provisions are constitutional (due process) under *New Motor Vehicle Board v. Fox,* 439 U.S. 96, 99 S. Ct. 403 (1978), where, *inter alia,* this Court rejected a California separation of powers challenge to nearly identical provisions?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment (§1):

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Nevada Constitution, Art. 1, §8:

> "No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this state may keep, with the consent of congress, in time of peace, and in cases of petit larceny, under the regulation of the legislature) except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or attorney-general of the state, and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made."

Nevada Constitution, Art. 3, §1:

> "The powers of the Government of the State of Nevada shall be divided into three separate

departments, — the Legislative, — the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted."

Nevada Constitution, Art. 6, §6:

"The District Courts in the several Judicial Districts of this State shall have original jurisdiction in all cases in equity; also in all cases at law which involve the title or the right of possession to, or the possession of real property, or Mining claims, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand (exclusive of interest) or the value of the property in controversy, exceeds Three Hundred Dollars, also in all cases relating to the estates of deceased persons, and the persons and estates of Minors and insane persons, and of the action of forcible entry and unlawful detainer; and also in all criminal cases not otherwise provided for by law; They shall also have final appellate jurisdiction in cases arising in Justices Courts, and such other inferior tribunals as may be established by law. The District Courts, and the Judges thereof shall have power to issue writs of Mandamus, Injunction, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdication; and also shall have power to issue writs of Habeas Corpus on petition by, or on behalf of any person held in actual custody in their respective districts."

STATUTORY PROVISIONS INVOLVED

The Nevada Revised Statutes involved in this case are set forth in Appendix D.

STATEMENT OF THE CASE

Nevada law provides that before an automobile manufacturer (respondent Chrysler, here) can establish a dealership where a dealership (petitioner Desert Chrysler-Plymouth, here) already exists in the same area, the former must give the latter 60 days' notice. If the existing dealer seeks injunctive relief against establishment of the new dealership, the Nevada Department of Motor Vehicles is prohibited from licensing the proposed dealership until a court decides if "good cause" exists.[1]

In mid-1977 respondent so notified petitioners,[2] who, within 60 days, sued for an injunction.

In the trial court, respondent moved for partial summary judgment, which was granted. Relying exclusively on the then-recent three-judge California district court decision in *Fox v. New Motor Vehicle Board of the State of California,* 440 F. Supp. 436 (C.D. Cal. 1977), the trial court declared the statute's "freeze" provisions unconstitutional (*see* Nevada Revised Statutes §§482.36365 and 482.36415; also 482.3642). The trial court concluded that the no prior hearing "freeze" was "violative of the Fourteenth Amendment of the United States Constitution and Article I, Section 8, of the Nevada Constitution in that it eliminated the provisions of due process and deprived the [Respondent] . . . of substantial rights in an arbitrary manner." *(See* Appendix C.)

---

1. *See* Nevada Revised Statutes §§482.36365, 482.36415, 482.3642.

2. Petitioner Kubena is President of petitioner Desert Chrysler-Plymouth, Inc.

The trial court then certified the issue to the Nevada Supreme Court. There, in briefs and exhibits numbering a couple of hundred pages,[3] the parties extensively discussed the federal due process issue presented by the trial court's action. Significantly, there was little or no discussion in the Nevada Supreme Court briefs of the *state* due process issue.

After the briefs had been filed, but before oral argument in the Nevada Supreme Court, this Court in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403 (1978) reversed the three-judge California district court decision, holding that no hearing was constitutionally necessary prior to the new dealership "freeze". Petitioners' comparison of the "freeze" aspects of the California Automobile Dealers Franchise Act with the Nevada law caused them to conclude that the two were identical, at least in principle, and at best perhaps the Nevada law even provided more eventual due process than did California.

Under the circumstances, petitioners filed "Supplemental Points and Authorities", calling the Nevada Supreme Court's attention to this Court's *Fox* decision.

Thus, on the eve of oral argument in the Nevada Supreme Court, the case's posture was this:

- The Nevada trial court had declared the "freeze" statute unconstitutional on state and federal due process grounds, though it had relied exclusively on the three-judge court, *federal* due process, *Fox* decision in California;

- The main briefs in the Nevada Supreme Court were almost, if not completely, confined to *federal* due process arguments;

3. Petitioner's opening brief was 23 pages long, respondent's brief was 63. Petitioner's reply brief was 70. There were other briefs as well.

- The California *Fox* decision had been overruled by this Court, of course on *federal* grounds;

- In the Nevada Supreme Court, petitioners had briefed the *Fox* reversal point, emphasizing that the Nevada statute — nearly identical to, or providing even more due process than, the upheld California statute — in no way violated *federal* rights, and that *Fox*'s approval of a no hearing "freeze" controlled this case.

Despite this manifest *federal* orientation to the case, and its having been limited up to that time to the due process question of the no hearing "freeze", at the oral argument in the Nevada Supreme Court, the case took an unexpected state-oriented turn onto an entirely different road. As petitioners' "Post Hearing Supplemental Brief" stated:[4]

> "At the oral argument on April 11, 1979, counsel for the respective parties were requested by the Court to file simultaneous supplemental briefs addressed to questions raised *sua sponte* by the Court at that time."

The questions posed were:

> I.
>
> DOES THE NEVADA AUTOMOBILE DEALERS FRANCHISE ACT [THE ENTIRE ACT!] VIOLATE ARTICLE 3, SECTION 6 [SEPARATION OF POWERS], OF THE NEVADA CONSTITUTION?

4. At p. 1.

II.

IS THE SEPARATION OF POWERS ISSUE, RAISED BY THE COURT, SUA SPONTE, PROPERLY DETERMINABLE ON THIS APPEAL?

The Post Hearing briefs of the parties addressed the separation of powers issue extensively, and eventually the Nevada Supreme Court held that:

> "For the reasons stated in *Galloway v. Truesdell* [83 Nev. 13, 422 P.2d 237 (1967)], we find that sections 11, 12, 20 and 21 of Chapter 295, 1977 Statutes of Nevada, *see* NRS 482.3636, 482.36365, 482.36415 and 482.3642 are unconstitutional because they are in violation of Article 3, Section 1, and Article 6, Section 6, of the Nevada Constitution."

The result, therefore, was that despite this Court's decision in *Fox* — that the "freeze" provisions of a virtually identical statute did *not* violate principles of *federal due process* — the entire Nevada statute was invalidated on *state* constitutional grounds rooted in *separation of powers.*

The further result was that because state separation of powers grounds had been invoked, the Nevada Supreme Court's invalidation of the "freeze" provisions appeared to be immune from this Court's review—even though in *Fox* this Court had *expressly* upheld virtually the identical "freeze" provision in the California law, and *impliedly* upheld its comparable delegation of power.

REASONS FOR GRANTING THE WRIT

The decision below raises important questions concerning "the accommodation of state and federal interests under the constitution" [*Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974)], especially the question of whether a state can preclude this Court's jurisdiction in a case otherwise suitable for review which involves wrongly decided federal claims.

The question presented in this petition for a writ of certiorari is: Does the decision below—that Nevada separation of powers is violated by provisions of a statute requiring a court to find a "good cause" before a new automobile dealership can be established—rest on a state ground sufficiently "adequate" to preclude this Court's review of whether those provisions are constitutional (due process) under *New Motor Vehicle Board v. Fox*, 439 U.S. 96, 99 S. Ct. 403 (1978), where, *inter alia*, this Court rejected a California separation of powers challenge to nearly identical provisions?

As long ago as 1875 this Court indicated that its ability to hear a case was not impaired by the presence of a non-federal ground. If a federal question was present in the record, jurisdiction was established, and where that question had been wrongly decided what happened next would depend on whether there was an "adequate" state ground. [*Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).] Review by this Court was allowable if the state ground was untenable, *e.g.:* one "without substantial basis" [*Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 543 (1930)]; one "so unfair or unreasonable in its application to those asserting a federal right as to obstruct it" [*Central Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 195 (1925)]; one "without any fair or substantial support" [*Ward v. Board of County Comm'rs.*, 253 U.S. 17, 22 (1920)]; or one that is simply "unreasonable" [*Vandalia R.R. v. Indiana ex rel. City of South Bend*, 207 U.S. 359, 367 (1907)].

No matter what the formulation, this Court's policy has long been clear: untenable state decisional grounds are no bar to this Court's review of wrongly decided federal claims.

As to whether the federal claims were wrongly decided in the Nevada trial court (the Nevada Supreme Court not having reached them), not a lot need be said. At the core of both the California statute upheld by this Court in *Fox* and the Nevada statute is the power of an existing car dealer to prevent (to "freeze"), for a short period but without a hearing, the manufacturer from establishing a closely located dealership until an administrative board in California and a court in Nevada rule on "good cause" for establishing the new dealership.

For reasons which were not stated, the Nevada trial court held that the statute's "freeze" provisions violated state and federal due process (*see* Appendix C).

However, in *Fox* this Court reached the opposite conclusion. Justice Brennan stated the question thusly:

> "The narrow question before us, then, is whether California may, by rule or statute, temporarily delay the establishment or relocation of automobile dealerships pending the *Board's* adjudication of the protests of existing dealers. Or stated conversely, the issue is whether . . . the right to franchise without delay is the sort of interest that may be suspended only on a case by case basis through prior individualized trial-type [*administrative*] hearings." (Emphasis added.)

This Court's answer was that "California was not required to provide for a prior individualized hearing" before an administrative board. Though *Fox* involved the later "good cause" determination being made by an administrative agency rather than by a court as in Nevada, the distinction is

inconsequential and indeed irrelevant as to the "freeze" provisions, and Nevada's "freeze" provisions seem wholly controlled by *Fox*. The case's point seems to be that *no* "pre-freeze" hearing is required under these kinds of statutes.

As noted, not only did the Nevada Supreme Court invalidate the "freeze" provision, but it did so solely on the basis of state separation of powers: "For the reasons stated in *Galloway v. Truesdell, supra,* we find that sections 11, 12, 20 and 21 . . . are unconstitutional because they are in violation of Article 3, Section 1, and Article 6, Section 6, of the Nevada Constitution." (*See* Appendix B, 7a).

Since it is this Court which decides the adequacy of state decisional grounds [*e.g., Postal Tel. Cable Co. v. City of Newport,* 247 U.S. 464 (1918), *Ancient Egyptian Order v. Michaux,* 279 U.S. 737 (1929)], and since in this case that adequacy (or lack of it) controls the resolution of important federal claims, it is important to note two things about the Nevada Supreme Court's separation of powers decision.

First, it relied *exclusively* on *Galloway v. Truesdell.* There, a Nevada statute required:

> "(1) an ordained minister to make application to a District Judge for a certificate (license) to perform marriages; and (2) the District Judge is to determine the qualifications of the minister. To determine the qualifications of the minister
>
> (a) the District Judge may require the minister's congregation to furnish evidence of qualification and if so required the congregation *shall* furnish such evidence; and (b) the Sheriff and the District Attorney shall conduct an investigation at the request of the District Judge.

> The District Judge may thereupon grant or deny the certificate (license); and he may thereafter revoke the certificate for good cause shown after hearing."

It appears that *Galloway* is irrelevant to this case. Whether or not the tasks delegated to Nevada's judges *there* violated that state's separation of powers, Nevada's delegation *here* manifestly does not. Suffice it to say that here *all* purely administrative tasks relating to dealership licensing remain with the administrative agency, with the *court* being charged solely with judicial business: determining whether an *injunction* is appropriate, based on the *statutory* standard of "good cause", [*see*, N.R.S. §§482.36365(2), 482.36365(4), 482.36415(2), 482.3642)].

Second, when in *Fox* this Court held on federal grounds that the California "freeze" was constitutional (contrary to the Nevada trial court in this case), this Court implied that the *total* delegation of power — to already existing dealers to "freeze", and later to the administrative agency to decide "good cause" — was equally constitutional. It would appear that Nevada's delegation of power — to already existing dealers to "freeze", and later to a court to decide whether an injunction should be granted for "good cause" — would be equally constitutional, if not more so, because in Nevada a *court* is involved rather than an administrative agency. Indeed, for that reason alone this case would appear to be even stronger than *Fox*, especially when one considers that what the court is asked to do in Nevada is peculiarly judicial business. Moreover, it can be argued that in *Fox* this Court *expressly* decided the separation of powers issue:

> "Appellees and the dissent argue that the California scheme constitutes an impermissible delegation of state power to private citizens because the Franchise Act requires the Board to delay franchise establishments and relocations only when protested by existing franchises who

> have unfettered discretion whether or not to protest.
>
> The argument has no merit." (439 U.S. at 108-109).

In sum, this petition for a writ of certiorari asks the Court to address the question of whether the state separation of powers ground exclusively relied on by the Nevada Supreme Court is sufficiently "adequate" to immunize from this Court's review Nevada's invalidation of statutory provisions virtually identical to those upheld by this Court in *Fox*.

That question is important and should be addressed not only because of the obvious Supremacy Clause implications, but also because of the uncertainty created by the Nevada decision in the area of "prior hearing" cases, and also because of that decision's potentially unsettling effect on the Automobile Dealers Day in Court Act (15 U.S.C. §§1221-1225), which was enacted by Congress in 1956 to protect automobile dealers and which has been upheld in case after case [*e.g.*, *Woodard v. General Motors Corporation*, 298 F.2d 121 (5 Cir. 1962), *Hanley v. Chrysler Motors Corporation*, 433 F.2d 708 (10 Cir. 1970), *Barney Motor Sales v. Cal. Sales Inc.*, 178 F. Supp. 172 (S.D. Cal. 1959), *Blenke Brothers Company v. Ford Motor Company*, 203 F. Supp. 670 (N.D. Ind. 1962), *Volkswagen Inter-Americana S.A. v. Rohlsen*, 360 F.2d 437 (1 Cir. 1966)].

CONCLUSION

The decision of the Nevada Supreme Court should be reviewed by this Court because that decision raises important questions concerning "the accommodation of state and federal interests under the Constitution" (*Kosydar v. National Cash Register Co., supra*), especially the question of whether a state can preclude this Court's jurisdiction in a case otherwise suitable for review which involves wrongly decided federal claims.

Respectfully submitted,

HENRY MARK HOLZER
NORMAN TY HILBRECHT
LESLIE T. JONES
Attorneys for Petitioners

APPENDIX A — ORDER DENYING REHEARING FILED DECEMBER 14, 1979

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 10459

FILED DEC. 14, 1979

By Judith McCulloch
Deputy Clerk

DESERT CHRYSLER-PLYMOUTH, INC., a corporation, and PETE KUBENA,

Appellants,

vs.

CHRYSLER CORPORATION, a corporation,

Respondent.

Appellants have failed to demonstrate that grounds for rehearing exist in this matter, pursuant to NRAP 40(c)(2). Accordingly, the petition for rehearing is denied.

It is so ORDERED.

s/ Mowbray, C.J.
Mowbray

s/ Thompson, J.
Thompson

s/ Gunderson, J.
Gunderson

Appendix A

s/ Manoukian, J.
Manoukian

s/ Batjer, J.
Batjer

cc:

Hon. Thomas J. O'Donnell, District Judge
Messrs. Hilbrecht, Jones, Schreck & Bybee
Messrs. Lionel, Sawyer & Collins
Morton Galane, Esq.
Loretta Bowman, Clerk

APPENDIX B — DECISION/JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEVADA FILED OCTOBER 10, 1979

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 10459

FILED OCT. 10, 1979

By Judith McCulloch
Deputy Clerk

DESERT CHRYSLER-PLYMOUTH, INC., a corporation, and PETE KUBENA,

Appellants,

vs.

CHRYSLER CORPORATION, a corporation,

Respondent.

Appeal from partial summary judgment, Eighth Judicial District Court, Clark County; Thomas J. O'Donnell, Judge.

Affirmed on other grounds.

Hilbrecht, Jones, Schreck and Bernhard, and Norman Ty Hilbrecht and L.T. Jones, Las Vegas,
for Appellants.

Lionel, Sawyer and Collins, and Robert M. Buckalew and Rodney M. Jean, Las Vegas,
for Respondent.

Appendix B

Morton R. Galane, P.C., and Morton R. Galane and James J. Jimmerson, Las Vegas,
for Amicus Curiae Nevada Franchised Automobile Dealers Association.

By the Court, BATJER, J.:

Appellants own the only Chrysler-Plymouth retail automobile dealership in Clark County, Nevada. On June 8, 1977, respondent notified appellants of its intention to establish another dealership in Clark County; the proposed dealership to be located several miles from appellants' place of business. On August 1, 1977, appellants filed suit in district court seeking, among other things, to enjoin the establishment of the second dealership.

Pursuant to Chapter 295, 1977 Statutes of Nevada, *see* specifically NRS 482.36365 and 482.36415(1), when the existing dealer files for injunctive relief, the director of the Department of Motor Vehicles cannot issue a license for the additional dealership until the court determines if there is "good cause" for the establishment of that dealership.[1] In its motion for partial summary judgment, respondent argued, relying upon a number of different theories, that this legislation was unconstitutional. The district court agreed, granted the motion and certified the issue pursuant to NRCP 54(b).[2] This appeal followed.

1. [Footnote omitted, containing text of NRS §§482.36365 and 482.36415(1)].

2. The district court found that the legislation denied respondent due process since the appellants were able to obtain a "de facto injunction" simply by the filing of the action. The district court based its decision on Orrin W. Fox Co. v. New Motor Vehicle Board, 440 F. Supp. 436 (C.D. Cal. 1977). However, subsequent to the district court's decision in this case, the United States Supreme Court reversed the federal district court's decision. New Motor Vehicle Board v. Orrin W. Fox Co., ___ U.S. ___, 99 S. Ct. 403 (1978).

Appendix B

During oral argument this court queried whether the statutory scheme was in violation of the separation of powers principle enumerated in Article 3, Section 1, and Article 6, Section 6, of the Nevada Constitution.[3] Further briefing was ordered on this issue.

Although we have on occasion declined to review constitutional issues not raised below, *e.g.,* Munoz v. State ex rel. Dep't of Highways, 92 Nev. 441, 444, 552 P. 2d 42, 43-44 (1976), we have done so not because of any jurisdictional limitation, but merely as a matter of practice. *See* Krause v. Sacramento Inn, 479 F. 2d 988, 989 (9th Cir. 1973). Relaxation of this rule is occasionally appropriate. *Cf.* Krause v. Sacramento Inn, *supra;* Staton v. Mayes, 552 F. 2d 908, 915 (10th Cir. 1977); Gomes v. Williams, 420 F. 2d 1364, 1367 (10th Cir. 1970); Ruth v. Indus. Comm'n, 490 P. 2d 828 (Ariz. 1971); VanSickle v. Shanahan, 511 P. 2d 223, 231 (Kan. 1973); Shavers v. Kelley, 267 N.W. 2d 72, 84-85, n. 14 (Mich. 1978); Laufenberg v. Cosmetology Exam. Bd., 274 N.W. 2d 618, 624 (Wisc. 1979). Furthermore, an appellate court may *sua sponte* raise a constitutional issue for the first time. Mountain States Tel. & Tel. Co. v. Animas Mosquito Control Dist., 380 P. 2d 560 (Colo. 1963). In the case at hand it is appropriate for this court to raise the separation of powers issue; since the statutes were assailed on constitutional grounds, it would be paradoxical for us to uphold the statutes on the grounds raised by the parties, yet ignore a clear violation of the separation of powers doctrine.

In Galloway v. Truesdell, 83 Nev. 13, 422 P. 2d 237 (1967), we held that a statute which delegated to the district courts the obligation of certifying licensed or ordained ministers to perform marriages was unconstitutional because the legislation imposed on the judiciary an administrative duty (licensing) which was not

3. [Footnote omitted, containing text of Nevada Constitution Art. 3, §1 and Art. 6, §6].

related to a judicial function. *See also* Cromwell v. Jackson, 52 A. 2d 79 (Md. 1947). Although the licensing function of the court was more conspicuous in the *Galloway* statutory scheme than it is here, the statutes herein involved nonetheless require the district courts to determine if a license should issue. Since the director of the Department of Motor Vehicles cannot license a new dealership until the district court has ascertained if "good cause" mandates the additional dealer, the court is in reality the licensing entity. Under this scheme the court is performing a pre-licensing fact-finding function rather than resolving an actual case or controversy. The Legislature cannot, using the guise of permitting a party to seek "injunctive relief", require the courts to perform such a non-judicial function.

In determining if good cause exists for the establishment of the additional dealership, the statutes mandate that the district court consider whether the additional dealership would be in the public interest. NRS 482.36365(4). Here the determination of "public interest" should not have been delegated to the courts. They are not equipped to independently investigate the facts in order to assure that the general public is protected. Chemical Bank & Trust Co. v. Falkner, 369 S.W. 2d 427, 432 (Tex. 1963).

Other states have enacted legislation dealing with the establishment of new automobile franchises. In most of those states the legislatures assigned the task of administering the legislation to an administrative board or agency.[4] In others the legislatures enacted legislation which made the arbitrary or

4. *E.g.*, Ariz. Rev. Stat. Ann. §28-1304.02 (1976); Colo. Rev. Stat. tit. 12, art. 6, §§101-123 (1978); Cal. Veh. Code §3062 (West Supp. 1977-1978); Fla. Stat. Ann. §320.642 (West 1975); Haw Rev. Stat. §§437-1 to 437-42 (1976); Iowa Code Ann. §§322A.1-.17 (West Supp. 1978); Neb. Rev. Stat. chap. 60, §§1401-1435 (1978); N.C. Gen. Stat. §20-305(5) (1978); R.I. Gen. Laws §§31-5.1(1)-(17) (Supp. 1978); S.D. Comp. Laws Ann. tit. 32, §§6A-3,-4 (1976); Tenn. Code Ann. §59-1714(c) (Supp. 1978); and Va. Code §46.1-547(d) (Supp. 1979).

unfair establishment of additional dealerships unlawful.[5] The Nevada statutes do not contain similar provisions. In testimony before the Senate Committee on Commerce and Labor the executive director of the Nevada Franchised Automobile Dealers Association explained to the Committee that the reason the courts, rather than the Department of Motor Vehicles, were being obligated to administer this legislation was because the director of that agency objected to the additional workload. Such a reason is hardly justification for imposing an unconstitutional function on the courts. For the reasons stated in Galloway v. Truesdell, *supra,* we find that sections 11, 12, 20 and 21 of Chapter 295, 1977 Statutes of Nevada, *see* NRS 482.3636, 482.36365, 482.36415 and 482.3642 are unconstitutional because they are in violation of Article 3, Section 1, and Article 6, Section 6, of the Nevada Constitution.

We now must determine if the remaining sections of Chapter 295 are severable from the parts herein held invalid. Despite the wording of NRS 0.020,[6] which is the general severability clause, it is a function of this court to consider whether the remainder of the statute can stand independently and whether the Legislature would have intended it to do so. County of Clark v. City of Las Vegas, 92 Nev. 323, 335-337, 550 P. 2d 779, 787-788 (1976). In this case it is clear that the legislation is separable and that the Legislature would have intended severance. The remaining sections of Chapter 295 define unfair business practices and provide for civil penalties when these laws are violated. *See* NRS 482.36425. Such legislation is divisible from that which imposes a licensing function on the district court. Furthermore, since it was the intent of the Legislature to enact a law that regulated motor vehicle franchises, it must be presumed that the Legislature

5. *E.g.*, Mass. Gen. Laws Ann. chap. 93B, §§4, 12, 12B (Supp. 1978); and N. Mex. Stat. Ann. §§57-16-1 to 57-16-16 (1978).

6. [Footnote omitted, containing text of NRS 0.020].

would have intended that the remaining portion of the act be severable from the invalid provisions. *See* NRS 482.318.[7] Anthony v. State, 94 Nev. 337, 580 P. 2d 939 (1978).

Because of our determination here we need not consider the constitutional issues raised by the parties.

Affirmed on other grounds.

s/ Batjer, J.
Batjer

We concur:

s/ Mowbray, C.J.
Mowbray

s/ Thompson, J.
Thompson

s/ Gunderson, J.
Gunderson

s/ Manoukian, J.
Manoukian

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7. NRS 482.318 provides:

> "The legislature finds and declares that the distribution and sale of motor vehicles in the State of Nevada vitally affects the general economy of the state and the public interest and the public welfare, and in the exercise of its police power, it is necessary to regulate and to license motor vehicle manufacturers, distributors, new and used vehicle dealers, rebuilders, leasing companies, salesmen, and their representatives doing business in the State of Nevada in order to prevent frauds, impositions and other abuse upon its citizens."

APPENDIX C — OPINION OF THE CLARK COUNTY (NEVADA) DISTRICT COURT

Case No. A172016
Department Number Four
Civil Docket C

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

DESERT CHRYSLER-PLYMOUTH, INC., et al.,

Plaintiff,

vs

CHRYSLER CORPORATION, et al.,

Defendant.

The primary issue before the Court is whether Sections 12 and 20 of Chapter 295 of the Nevada Legislature 1977 session (59th session) are constitutional.

Chrysler Corporation, in an attempt to comply with the provisions of Section 12, notified the plaintiff of its intent to enter into the establishment of a new franchise creating an additional dealership for new motor vehicles manufactured by the defendant.

Plaintiff applied to the District Court for injunctive relief to restrain the establishment of the defendant's proposed new dealership in the Las Vegas area.

According to the provisions contained in Section 12, the defendant was enjoined from proceeding with the creation of the

new dealership. The plaintiff by merely filing a complaint in the District Court, and filing a copy of that complaint with the Director of the Department of Motor Vehicles prevents the issuance of a license to the defendant, or revokes any license previously issued.

The provisions of Sections 12 and 20 call for no notice, no necessity to post security, and no hearing prior to the issuance of either a preliminary or permanent injunction.

Under existing law the temporary restraining order issued prior to hearing is valid only for a minimum period of time (fifteen days) without an extension for good cause.

In this particular case the Act in question eliminates the standard requirements for injunctive relief, and also shifts the burden to the manufacturer seeking to relocate an old franchise or establish a new one in the Las Vegas area.

The pertinent Sections 12 and 20 are unconstitutional because they are violative of the Fourteenth Amendment of the United States Constitution and Article I, Section 8, of the Nevada State Constitution in that they eliminate the provisions of due process and deprive the defendant in this case of substantial rights in an arbitrary manner. These rights include the rights to contract for the purchase of land, establish dealerships, and negotiate the terms of their business in an orderly fashion. The provisions of Sections 12 and 20 are discordant with the due process clause of both the Nevada State Constitution and the Fourteenth Amendment of the United States Constitution. These rights are subject to reasonable limitations by State regulations. However, these regulations that are imposed must be in harmony with due process provisions of both the Nevada and United States Constitutions.

The case of Fox v. New Motor Vehicle Board of the State of California, ____ F. Supp. ____, No. CV 76-1200 (C.D. Cal.

Sept. 14, 1977), cited by the defendant, is a well reasoned opinion dealing with a similar factual situation and substantially similar law, wherein a three Judge Court gave declaratory summary judgment based on the unconstitutionality of a California statute similar to the Nevada statute under consideration in this case.

Therefore, the Court issues a partial summary judgment in favor of the defendant with regard to all aspects of the case under consideration, with the exception of the determination of damages, if any, which may have resulted from the stock transaction entered into by the plaintiff, Mr. Kubena.

s/ Thomas J. O'Donnell
THOMAS J. O'DONNELL
DISTRICT JUDGE

APPENDIX D — NEVADA REVISED STATUTES

482.36365 Establishment, relocation of dealership in market area of dealer in same line or make: Notice; injunctive relief; good cause.

1. Sixty days before a manufacturer or distributor proposes to enter into a franchise establishing an additional dealership for new motor vehicles, or relocate an existing dealership in the relevant market area of another dealer in the same line and make, the manufacturer or distributor shall notify, by registered or certified mail, return receipt requested, the director and each dealer in that line and make in the relevant market area of its intention to establish or relocate an additional dealership.

2. Before the effective date of the proposed establishment of an additional dealership or relocation of an existing dealership, any aggrieved dealer may apply to the district court in the county where the dealership is located for injunctive relief to restrain the establishment or relocation.

3. In any hearing pursuant to this section, the manufacturer or distributor has the burden of proof to establish there is good cause for establishing an additional dealership or relocating an existing dealership.

4. In determining whether good cause has been established, the court shall take into consideration the existing circumstances, including:

(a) The permanency of the investment of any affected dealer.

(b) The effect on the retail new motor vehicle business and the consuming public in the relevant market area.

(c) Whether it is beneficial or injurious to the public welfare for an additional or relocated dealership to be established.

(d) Whether a dealer of the same line and make in that relevant market area is providing adequate competition and convenient service to consumers for the new motor vehicles of the same line and make, including the adequacy of new motor vehicle sales and service facilities, equipment, supply of vehicle parts and qualified sales and service personnel.

(e) Whether the action is for the purpose of coercing any existing dealer.

(Added to NRS by 1977, 555)

482.36415 Revocation of or refusal to issue dealer's license for franchise if action for injunctive relief instituted.

1. The director shall revoke or refuse to issue a dealer's license for a new franchise or a franchise replacing a canceled or terminated franchise if an action for injunctive relief pursuant to NRS 482.3636, 482.36365 or 482.36411 has been instituted and a copy of the complaint is filed with the director by the complaining dealer.

2. The court in which such action was filed may, however, in order to maintain adequate and competitive service in the area or upon a showing of good cause by the manufacturer, distributor or factory branch order the director to issue such dealer's license if the dealer complies with the provisions of this chapter pertaining to licensing of vehicle dealers.

(Added to NRS by 1969, 675; A 1977, 559)—(Substituted in revision for NRS 482.3639)

482.3642 Franchise of complaining dealer effective until civil action concluded; exception.

1. Upon the filing of a complaint pursuant to NRS 482.3636, 482.36365 or 482.36411 following the manufacturer's

or distributor's written notification of the intent to:

(a) Terminate, refuse to continue or modify unilaterally any existing franchise;

(b) Establish an additional dealership; or

(c) Relocate an existing dealership,

the franchise of the complaining dealer shall stay in full force and effect until the complaint is disposed of, unless the court, pursuant to NRS 482.36415, has ordered the director to issue a dealer's license to a new dealer.

2. If the new franchise is given by a manufacturer, distributor or factory branch for the sale of the same line and make of vehicle in the same relevant market area as that covered in the canceled or terminated franchise, such act is prima facie evidence that the new franchise replaced the canceled or terminated franchise.

(Added to NRS by 1969, 675; A 1977, 559)—(Substituted in revision for NRS 482.364)

Supreme Court, U.S.
FILED
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79-1274

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1257

DESERT CHRYSLER-PLYMOUTH, INC. and PETE KUBENA,

Petitioners,

vs.

CHRYSLER CORPORATION,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Nevada.

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Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Nevada.

Question Presented.

Is the decision below of the Nevada Supreme Court, which rests entirely upon the Separation of Powers provisions of the Nevada Constitution, based upon independent and adequate state grounds?

Reasons for Denying the Writ.

The Nevada Supreme Court Decided This Case on Adequate and Independent State Grounds, Specifically, Interpretation of the Nevada Constitution.

In 1977, the Nevada Legislature amended Nevada's motor vehicle franchise statutes by adding 20 sections to Chapter 482 of the Nevada Revised Statutes. The Nevada Supreme Court subsequently found four of

these sections violative of Nevada's Constitution, *Desert Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 95 Nev. Adv. Op. 175, 600 P.2d 1189 (1979). The remaining sections were held severable from the invalid sections.

The provisions held invalid (See Appendix D to Petition for Writ of Certiorari) placed non-judicial duties upon Nevada district court judges. The statutes required a district court judge to perform prelicensing, ministerial, fact-finding functions—administrative functions—rather than resolving an actual case or controversy — judicial functions. See Nev. Rev. Stat. §482.36415.

Because the statutes placed administrative duties on the judiciary, the Nevada Supreme Court held them violative of the separation of powers doctrine of the Nevada Constitution, Article 3, Section 7, and Article 6, Section 6 (See Petition for Writ of Certiorari, pp. 3, 4, and Appendix B), citing *Galloway v. Truesdell,* 83 Nev. 13, 422 P.2d 237 (1967).

Separation of powers was not an issue in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) and Petitioner's reliance on that case is misplaced. Unlike the Nevada statute, the California enactment involved in *Fox* properly placed the fact-finding, pre-licensing determinations with an administrative agency which was adequately equipped to independently investigate the facts and hold hearings. Cal. Veh. Code §3062 (West Supp. 1977-1978). The Nevada Supreme Court recognized that many other states enacted recent legislation dealing with the establishment of new automobile franchises. It found the Nevada statute to be the only one that assigned purely administrative functions to the judiciary. Thus, this case has no impact on the statutes of other states.

Precisely because of this distinction between the Nevada statutes and the California and other states' statutes dealing with new automobile franchises, this case was decided on adequate and independent state grounds, and the Nevada Supreme Court never reached the various federal questions raised below. This Court will not review a state court decision resting upon adequate and independent state grounds, *Herb v. Pitcairn,* 324 U.S. 117 (1944). In *Terrace v. Thompson,* 263 U.S. 197 (1923), this Court stated:

> The question of whether or not a state statute conflicts with the Constitution of the state is settled by the decision of its highest court. [Citation omitted.] This court is without authority to review and revise the construction offered to a state statute as to a state matter by a court of last resort of the state.

263 U.S. at 224. *Accord, Montana Ex Rel. Haire v. Rice,* 204 U.S. 291 (1907).

Because the Nevada Supreme Court decision in this case rests entirely upon interpretation of the Nevada Constitution, certiorari should not be granted.

Conclusion.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT M. BUCKALEW,

Attorney for Respondent.